158-118

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 293.

THE PACIFIC RAILROAD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1904.

(14,749.)

(14,749.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 233.

THE PACIFIC RAILROAD, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 31, 1894.

1 In the Court of Claims.

THE PACIFIC RAILROAD
vs.
THE UNITED STATES. } No. 16243.

I.—*Petition. Filed May* 2, 1888.

The petition of the Pacific railroad respectfully represents and shows to the court that it is a body corporate, duly created, established, and existing under and by virtue of the laws of the State of Missouri.

That on the 20th day of April, 1885, a suit was, and for a long time prior thereto had been, pending in the United States Court of Claims, in which said suit the claimant above named, The "Pacific Railroad," was claimant, and The United States was defendant, which said suit was No. 11825 upon the docket of said court. The plaintiff's claim in said suit for $130,196.98 was not contested by the United States on its merits, but the United States pleaded as payment and set-off the alleged reasonable cost of certain labor and materials furnished as alleged by the United States at the re-
2 quest of the claimant in the construction of four bridges and trestles on the line of the claimant's road, between October 1, 1864, and May 1, 1865.

That on the 20th day of April, 1885, this court found its findings of fact and conclusions of law in said suit, No. 11825, among others, as follows:

"Claimant should recover $130,196.98 for monies withheld for services rendered as set forth in finding V, and the defendant should recover for rebuilding the bridge across the Moreau $30,801, and for rebuilding the two bridges across the Maramec $54,595.24, amounting in the aggregate to $85,396.24, and judgment to be entered in favor of the claimant for the balance remaining, to wit, $44,800.74."

That on said 20th day of April, 1885, judgment was entered in accordance with the findings of said court, in favor of the said Pacific Railroad, claimant, and against the said United States, defendant, for the sum of $44,800.74, and no more.

That thereafter, and in due time, both the said claimant and said defendant appealed from the said judgment to the Supreme Court in due form as required by law.

That at the October term of said Supreme Court, 1886, after hearing duly had, the said court was of the opinion that the claimant was entitled not only to the judgment for $44,800.74, but to a judgment for the full amount of its claim, without any deduction by reason of the alleged defences, payments, or set-offs claimed or pleaded by the United States; and the said court accordingly reversed the judgment of the Court of Claims, and entered an order in said cause as follows:

"It is further ordered that this cause be and the same is hereby remanded to the said Court of Claims with directions to enter judg-

ment for the full amount claimed by the railroad company for its services."

3 That thereafter and thereupon a mandate was duly issued and filed in this court directing the entry of judgment as aforesaid, which entry was duly made in favor of said claimant, and against the said defendant, on the ninth day of February, 1887, for the sum of $130,196.98, instead of the sum of $44,800.74.

Your petitioner further shows that on the 29th day of April, 1885, the claimant above named duly presented to the Secretary of the Treasury, and filed in the Treasury Department of the United States for payment, the said judgment for the sum of $44,800.74 so rendered as aforesaid by this court on the 20th day of April, 1885, which said judgment, when so presented, was duly certified by the clerk of this court and signed by the proper justice thereof as required by law; and the claimant thereupon demanded payment thereof; and that the same was not paid although the Congress of the United States made appropriation by law for the payment and satisfaction thereof.

Your petitioner further shows that on the ninth day of February, 1887, it duly presented to the Secretary of the Treasury for payment, and filed in the Treasury Department of the United States for payment, a copy of the said judgment duly certified and signed, so entered in the Court of Claims as aforesaid, for the sum of $130,196.98 on the ninth day of February, 1887, and demanded payment thereof, but the same was not paid until the 2d day of February, 1888.

Your petitioner further shows that the said defendant has not at any time paid interest upon the said judgments so rendered as aforesaid, or either of them, although often requested so to do. That there is now due from the defendant to the claimant, interest on the said judgment so rendered as aforesaid, on the said 20th day

4 of April, 1885, for the sum of $44,800.74, from the time of the presentation of the same to the Secretary of the Treasury for payment on the twenty-ninth day of April, 1885, to the ninth day of February, 1887, the date of the entry of the final judgment in the action, at the rate of five per cent. per annum, amounting to the sum of $4,337.82; and on the said judgment so rendered in favor of the said claimant for $130,196.98 from the ninth day of February, 1887, the time of the presentation of the same to the Secretary of the Treasury for payment as aforesaid, to the time of the payment of the same by the defendant on the 2d day of February, 1888, at the rate of five per cent. per annum, amounting to the sum of $6,415.48.

Your petitioner further shows that no assignment or transfer of said claim, or any part thereof or interest therein, has been made; that your petitioner is the owner thereof, and is justly entitled to the amount hereinbefore stated, from the United States, after allowing all just credits and offsets; that your petitioner has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given

encouragement to rebellion against the said Government; and the facts stated in said petition your petitioner believes to be true.

Your petitioner therefore asks for judgment in its favor and against the United States for the sum of $10,753.30.

J. COLEMAN,
Att'y for Petitioner.

STATE OF NEW YORK, }
City and County of New York, } *ss:*

S. H. H. Clark, being duly sworn, says that he is an officer of the Pacific railroad, the claimant mentioned in the foregoing petition, viz., the president thereof; that he has read the foregoing petition and knows the contents thereof, and that he believes the same to be true.

S. H. H. CLARK.

Subscribed and sworn to before me, this 30th day of April, A. D. 1888.

[SEAL.] WM. J. HARDING,
Notary Public, Kings Co., N. Y.

Certificate filed in New York Co.

5 II.—*Traverse. Filed November* 24, 1888.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

ROBERT A. HOWARD,
Assistant Attorney General.

6 III.—*Submission of Case, May* 20, 1891.

At a Court of Claims held in the city of Washington on the 20th day of May, A. D. 1891, this cause was submitted by Mr. Coleman, for the claimant, and by Mr. Assistant Attorney General Cotton, for the defendants, on the evidence and briefs.

7 IV.—*Findings of Fact and Conclusion of Law. Filed June* 8, 1891.

This case having been heard by the Court of Claims the court upon the evidence finds the facts to be as follows:

I.

On the 28th of April, 1885, the claimant recovered judgment against the defendants in the Court of Claims for the sum of $44,800.74.

On the 29th of April, 1885, the claimant presented to the Secretary of the Treasury a copy of said judgment, certified by the clerk of the Court of Claims and signed by the chief justice. Said judgment was not paid, except as hereinafter stated.

II.

From said judgment both parties took an appeal to the Supreme Court, the defendants July 14, and claimant July 15, 1885.

The case was tried and determined by the Supreme Court, and the following mandate was filed in the Court of Claims February 9, 1887:

UNITED STATES OF AMERICA:

The President of the United States of America to the honorable the judges of the Court of Claims, Greeting:

Whereas lately in the Court of Claims, before you or some of you, in a cause between The Pacific Railroad, claimant, and The United States, defendant, No. 11825, wherein the judgment of the said Court of Claims, entered in said cause on the 20th day of April, A. D. 1885, is in the following words:

"The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the said Pacific railroad do have and recover of and from the United States the sum of forty-four thousand eight hundred dollars and seventy-four cents ($44,800.74)," as by the inspection of the transcript of the record of the said Court of Claims (which was brought into the Supreme Court of the United States by virtue of an appeal taken by the United States and a cross-appeal taken by the Pacific railroad agreeably to the act of Congress in such case made and provided) fully and at large appears;

And whereas, in the present term of October, in the year of our Lord one thousand eight hundred and eighty-six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, on appeal and cross-appeal, and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be, and the same is hereby, reversed.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Court of Claims with directions to enter a judgment for the full amount claimed by the Pacific Railroad Company for its services.

January 31st, 1887.

III.

Thereupon on February 19, 1887, the Court of Claims entered judgment anew in favor of the claimant for the sum of $130,196.98, according to said mandate.

On the 9th day of February, 1885, the claimant presented to the Secretary of the Treasury a copy of said judgment for the sum of $130,196.74, certified by the clerk of the Court of Claims and signed by the chief justice.

IV.

The principal sum of said last-named judgment has been paid under the act of 1888, Feb'y 1, ch. 4 (25 Stat. L., 24), but the defendants refuse to pay any interest on either judgment.

Conclusion of Law.

The court upon the foregoing findings of fact decide as a conclusion of law that the claimant is not entitled to recover and the petition is dismissed.

8 V.—*Opinion of the Court.*

RICHARDSON, *Ch. J.*, delivered the opinion of the court:

This is a claim for interest on a judgment.

The Revised Statutes provide as to the payment of judgments of the Court of Claims as follows:

SEC. 1089. In all cases of final judgments by the Court of Claims, or, on appeal, by the Supreme Court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of the Court of Claims and signed by the chief justice, or, in his absence, by the presiding judge of said court.

SEC. 1090. In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid.

The defendants having paid the principal of the final judgment for $130,196.74, entered in this court upon the mandate of the Supreme Court reversing the former judgment, refuse to pay interest on either judgment—the one reversed, or the one entered by order of the Supreme Court.

The claimants, in support of their claim for interest, rely upon the decision in Hobbs' case (19 C. Cls. R., 279). There is, however, a material distinction between the two cases in this, that in Hobbs'

case the Supreme Court affirmed the judgment of the Court of Claims and issued the following mandate:

It is now here ordered and adjudged by this court that the judgment of the said Court of Claims in this cause be and the same is hereby affirmed for the full amount of the award made to the claimant, and that an additional amount of $2,660 should be allowed for the two items of extra expense referred to in the opinion of this court.

The Court of Claims following the mandate entered a new judgment for the additional amount allowed by the Supreme Court in the following form:

The Supreme Court of the United States having affirmed the judgment rendered by this court in this cause in favor of Campbell K. Peck, on the 10th day of February, 1879, for forty-three thousand one hundred and thirteen dollars, and also ordered this court to allow the claimant the additional sum of two thousand six hundred and sixty dollars, it is therefore ordered, adjudged, and decreed that the said John W. Hobbs, assignee in bankruptcy of said Campbell K. Peck, have and recover of and from the United States the sum of two thousand six hundred and sixty dollars, in addition to that adjudged and decreed on the 10th day of February, 1879. And it is further ordered that the transcript of this judgment for presentation to the Secretary of the Treasury for payment be delivered to Sanborn and King, attorneys of record for the claimant.

Judgment of Court of Claims.....	$43,113 63
Additional by Supreme Court.....	2,660 00
	45,773 63

The defendants cite an opinion of the Attorney General in this very case (18 Opins., 547), in which he advises the Secretary of the Treasury that he cannot pay interest on the judgment. We agree with him in this conclusion, although he seems to have overlooked the grounds upon which the Court of Claims allowed interest in the Hobbs case which he refers to, wherein the original judgment was affirmed. Here the original judgment was reversed and a new judgment was ordered and entered.

The Supreme Court, for some good reason undoubtedly, treated the cases differently, making their mandate in such form as to give the claimant the right to interest in one case and not in the other.

Moreover Congress, in making appropriations for payment of many judgments of the Court of Claims by the act of 1888, February 1, chap. 4 (25 Stat. L., 27), while it allowed interest on several specified judgments, carefully provided that payment to the claimant of the amount of principal shall be "in full satisfaction of the judgment" in these words:

To pay the judgment of the Court of Claims in favor of the Pacific railroad eighty-five thousand three hundred and ninety-six dollars and twenty-four cents, being in addition to the sum of fourty-four thousand eight hundred dollars and seventy-four cents appropriated by the act of August fourth, eighteen hundred and

eighty-six, to pay a judgment in favor of said Pacific railroad, which two sums shall be in full satisfaction of the judgment in favor of the Pacific railroad reported to Congress in the House Executive Document number twenty-nine, Fiftieth Congress, first session.

On these terms payment was made.

The judgment of the court is that claimant has no cause of action and the petition must be dismissed.

9 VI.—*Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 8th day of June, A. D. 1891, in the aforesaid cause, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, The Pacific Railroad, be dismissed.

BY THE COURT.

10 VII.—*Application for and Allowance of Appeal.*

THE PACIFIC RAILROAD
vs.
THE UNITED STATES. } No. 16243.

And now comes the claimant, The Pacific Railroad, by its attorney, James Coleman, and prays the allowance of an appeal to the Supreme court of the United States from the judgment of this honorable Court, heretofore rendered, dismissing the petition filed by the claimant herein, and from the whole thereof.

JAMES COLEMAN,
Attorney for Claimant.

Washington, D. C., June 18th, 1891.

Filed and allowed in vacation, June 18, 1891.

WILLIAM A. RICHARDSON,
Chief Justice.

11 In the Court of Claims.

THE PACIFIC RAILROAD
vs.
THE UNITED STATES. } 16243.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court herein, of the opinion of the court, of the judgment of the court, of the application of the claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at the city of Washington, this sixth day of July, A. D. 1891.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims

Endorsed on cover: Case No. 14,749. Court of Claims. No. 233. The Pacific Railroad, appellant, *vs.* The United States. Filed July 18th, 1891.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE PACIFIC RAILROAD,
APPELLANT,
v.
THE UNITED STATES.

No. 353.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

JAMES COLEMAN,
A. T. BRITTON,
A. B. BROWNE,
Att'ys for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE PACIFIC RAILROAD,
APPELLANT,

v.

THE UNITED STATES.

No. 233.

BRIEF FOR APPELLANT.

STATEMENT.

In the year 1880 the Pacific Railroad of Missouri filed its petition in the Court of Claims to recover from the United States, for transportation services on its line of railroad in the State of Missouri, the sum of $130,196.98.

The Government interposed as a defence, by way of set-off, that the railroad company was indebted to it for the cost of reconstructing four bridges which had been destroyed on its line of road during the war:

One over the Osage river at an expense of $96,152.65; one over the Moreau river at an expense of $30,801; and two over the Maramec river at an expense of $54,595.24.

The case came on to be heard on the 20th day of April, 1885. The Court found that the claimant was entitled to recover from the defendant the sum of $130,196.98 for money due the company for services rendered in the transportation of military passengers and freight; that the claim was duly presented to the Government within six years from the time it accrued. In fact, the rendering of the service and the amount due therefor was not questioned on the hearing. The Court further found that the Government should recover for rebuilding the bridge across the Moreau river the sum of $30,801, and for rebuilding the two bridges across the Maramec river the sum of $54,595.25, amounting together to the sum of $85,396.25, and gave judgment in favor of the claimant for the balance, $44,800.73.

The defendant appealed from the judgment on the 14th day of July, 1885, and on the 15th day of July, 1885, the claimant appealed.

Before the appeals were taken the claimant, on the 29th day of April, 1885, duly presented to the Secretary of the Treasury, and filed in the Treasury Department, for payment, the judgment for $44,800.74, rendered in the Court of Claims, and demanded payment.

The case came on for hearing in this Court and is reported in the 120 *U. S. Reports*, 227. In the opinion of the Court, Mr. Justice Field said:

"From the 14th of August, 1867, to the 22d of July, "1872, it" (the R.R. Co.) "rendered services by the trans- "portation of passengers and freight for which the "United States are indebted to it in the sum of $130,196.98, "unless they are entitled to offset the cost of labor and "materials alleged to have been furnished by them at its "request for the construction of certain bridges on the "line of its road. The extent and value of the services

" are not disputed. It is only the offset or charge for " the bridges which is in controversy." * * *

And after reviewing the case and citing authorities, the Court ordered that—

" *The judgment of the Court of Claims must therefore* " *be reversed and judgment be entered for the full amount* " *claimed by the railroad company for its services, and it* " *is so ordered.*"

The mandate was duly issued to the Court below, and judgment was then entered, on the 9th day of February, 1887, in favor of the claimant, for the sum of $130,196.98, the full amount claimed to be due by the company.

On the 9th day of February, 1887, the claimant filed with the Secretary of the Treasury a copy of the judgment of the Court for $130,196.98, duly certified and signed, and demanded payment thereof, but the same was not paid until February 2, 1888, when the United States paid the principal sum of the judgment but refused to pay interest thereon.

The act of Congress making appropriation for the payment of the judgment contained the following:

" To pay the judgment of the Court of Claims in favor " of the Pacific Railroad eighty-five thousand three hun- " dred and ninety-six dollars and twenty-four cents, being " in addition to the sum of forty-four thousand eight " hundred dollars and seventy-four cents appropriated by " the act approved August 4, 1886, to pay a judgment in " favor of said Pacific Railroad, which two sums shall be " in full satisfaction of the judgment in favor of the Paci- " fic Railroad reported to Congress in the House Execu- " tive Document number twenty-nine, Fiftieth Congress, " first session." (25 Stats. L. 27.)

The appellant then, on the 2d day of May, 1888, filed

its petition in the Court of Claims to recover from the defendant interest on the judgment rendered on the 20th day of April, 1885, for the sum of $44,800.74 from the time of the presentation of the same to the Secretary of the Treasury for payment, on the 29th day of April, 1885, to the 9th day of February, 1887, the date of the entry of the judgment in the action for $130,196.98, at the rate of five per cent. per annum, amounting to the sum of $4,337.82; and on the judgment entered in favor of the claimant for $130,196.98 from the 9th day of February, 1887, the date of the presentation of the same to the Secretary of the Treasury for payment, to the time of the payment of the same, on the 2d day of February, 1888, at the rate of five per cent. per annum, amounting to the sum of $6,415.48.

On the hearing the Court found its findings of fact. (R. pp. 3, 4, 5.)

And as conclusions of law the Court found:

"The Court, upon the foregoing findings of fact, decide "as a conclusion of law that the claimant is not entitled "to recover, and the petition is dismissed." (R. p. 5.)

ASSIGNMENTS OF ERROR.

The Court erred in its conclusion of law upon the facts found that the claimant was not entitled to recover, and in dismissing its petition.

POINTS.

I.

The right to recover in this action is based upon secs. 1089 and 1090 of the Revised Statutes, viz.:

"SEC. 1089. In all cases of final judgments by the Court "of Claims, or, on appeal, by the Supreme Court, where

" the same are affirmed in favor of the claimant, the sum " due thereby shall be paid out of any general appropri- " ation made by law for the payment and satisfaction of " private claims, on presentation to the Secretary of the " Treasury of a copy of said judgment, certified by the " Clerk of the Court of Claims and signed by the Chief " Justice, or, in his absence, by the presiding judge of said " Court.

" SEC. 1090. In cases where the judgment appealed from " is in favor of the claimant, and the same is affirmed by " the Supreme Court, interest thereon at the rate of five " per centum shall be allowed from the date of its pres- " entation to the Secretary of the Treasury for payment " as aforesaid, but no interest shall be allowed subsequent " to the affirmance, unless presented for payment to the " Secretary of the Treasury as aforesaid."

The judgment of the Court below was affirmed so as to bring the claimant within the provisions of the above statute.

Judgment was rendered in favor of the claimant and a copy, duly authenticated, was presented to the Secretary of the Treasury for payment; the defendant appealed. This Court found that the claimant was *not only entitled to recover the amount of the judgment of the Court below, but a sum in addition thereto.*

The theory on which the Government refuses to pay interest on its debts is that it is supposed to pay its debts when due, and sec. 1091 of the Statutes provides that " no interest shall be allowed on any claim up to the time " of the rendition of the judgment thereon by the Court " of Claims."

The sum of $44,800.74 was found to be due the claimant by the Court below, and judgment was rendered in its favor therefor.

It is true that the claimant appealed to this Court, but not until after the defendant had appealed, so that it was

not the act of the claimant, but of the defendant, that caused the delay, and it cannot be argued that the claimant voluntarily placed itself in a position from which it could not legally demand payment; the defendant did this by its appeal, and cannot now urge that the claimant is not, for this reason, entitled to recover. But the claimant did not appeal for the reason that any part of its claim was rejected, for it was not; the whole amount—$130,196.98—was allowed. The claimant appealed for the reason that the Court allowed the cost of rebuilding the bridges over the Osage and Moreau rivers to be offset against the claim which had been found to be due it for services. The defendants appealed because they were not allowed the cost of rebuilding the bridge over the Osage; and it was the question of the right of the Government to recover against the company the cost of rebuilding the bridges that was heard and determined on appeal, and nothing more. As Mr. Justice Field said, "the extent and value of the ser-"vices are not disputed—it is only the offset or charge for "rebuilding the bridges that is in controversy."

An appeal to this Court from the Court of Claims brings up for review the complaint of the appellant only. Neither complained of the allowance to the company for its services. The Court ascertained and determined the amount, on the 20th day of April, 1885, to be $44,800.74, and we submit that from the time that amount was ascertained the claimant is entitled to interest to the date of the entry of final judgment, on the 9th day of February, 1887.

United States v. *Hickey*, 17 *Wall.* 9.
Hobbs v. *The United States*, 19 *Court of Claims*, 220.

II.

It is contended that the clause in the appropriation act, that the payment to the claimant of the amount of $130,196.98 should be "in full satisfaction of the judgment," is a bar to its recovery.

There is no evidence in the record, and the findings of fact do not show, that the claimant accepted the amount of the principal sum of the judgment in full satisfaction of its claim. The fact is, that the claimant knew nothing of the clause in the appropriation act until after payment of the principal sum. Neither would he be supposed to know. A copy of the judgment had been certified to the Secretary of the Treasury for payment, and the claimant had a right to suppose that it would be paid the same as all judgments are. By certifying the judgment interest had been demanded, and interest could not have been released without an agreement of the parties to that effect.

In the case of *United States* v. *Bostwick* (94 U. S. 53) the Court say: "Payment by a debtor of a part of its "debt is not a satisfaction of the whole, except it be made "and accepted upon some new consideration," and the doctrine is there applied to the United States.

There are no facts in this case tending to show an intention on the part of the claimant to release the interest which the defendant had agreed by its statute to pay. In *Chicago, &c., Railway Company* v. *The United States* (104 U. S. 684) the Court say: "The Government, what"ever power it may reserve over its own agreements, can"not impose new contracts upon those with whom it "deals."

In the construction of contracts with the Government,

the Court of Claims is bound to apply the ordinary principles which govern such contracts between individuals.

Smoot's Case, 15 Wall. 36.

As between individuals, the payment of a part of a liquidated demand or debt will not extinguish the debt, even though such be the agreement of the parties at the time of the payment, unless based upon a new consideration.

Am. and Eng. Ency., vol. 18, p. 230—title, Payment.

In Hobb's case, *supra* (19 Ct. Cl. 220, 228), it was said:

"In this case the defendants, by their own statute "agreed to pay interest, and there can be no better con- "tract than that."

In *Sinking Fund Cases* (94 U. S. 700, 719) this Court said:

"The United States are as much bound by their con- "tracts as are individuals. If they repudiate their obliga- "tions, it is as much repudiation, with all the wrong and "reproach that term implies, as it would be if the repudi- "ator had been a State or a municipality or a citizen. "No change can be made in the title created by the grant "of the lands or in the contract for the subsidy bonds, "without the consent of the corporation. All this is un- "disputable."

In his dissenting opinion therein Mr. Justice Strong well observed:

"There is no technicality about vested rights. Most "of them grow out of contracts, and, no matter how they "arise, they are all equally sacred, equally beyond the "reach of legislative interference. A vested right of "action is property in the same sense in which rights to "tangible things are, and is equally protected; whether it

" springs from contract or from other rules of the com-
" mon law, it is not competent for the legislature to take
" it away."

By law interest on this judgment had accrued, and become a vested property right in this claimant, before the act of Congress appropriating a less sum than that lawfully due thereunder. The obligation of the United States was to make payment of the principal and interest. The right to the one was as complete as the right to the other. *Together* they constituted the judgment which had been duly entered according to the law of the land. The condition sought to be imposed by Congress, viz., to compel acceptance of less than the amount lawfully due the claimant, was void. It was an attempted change of the contract—a taking of property from this claimant without due process of law.

As applied between individuals, the rule is well settled that partial payment of a liquidated demand does *not* extinguish or satisfy the debt unless some new consideration attend the transaction.

This rule is applied against the United States in *Baldwin* v. *United States* (15 Ct. Cls. 297, 303) thus:

" There is no principle of the common law better estab-
" lished and more generally recognized than that a pay-
" ment, which is only in accordance with the terms of the
" contract and after its maturity, of part of a liquidated
" and ascertained debt is no satisfaction in law of the whole
" indebtedness, and that a receipt in full given upon such
" part payment is *nudum pactum* as to the unpaid balance,
" and not binding upon the maker. (Chitty's Con., Per-
" kins' ed., 821—title, Payment; 2 Parsons Con., 4th ed.,
" 129; Bostwick *v.* United States, 94 U. S. 53, and 12 C.
" Cls. R. 67.)

" There are some apparent, though not real, exceptions.
" To make the receipt of part a discharge of the whole,

" there must be a new consideration, or a voluntary and
" well-understood compromise of a disputable and dis-
" puted claim, by which each party yields something for
" the concessions of the other; or an accord and satisfac-
" tion by which a new contract is substituted, or a sub-
" mission to arbitration; in each of which cases a consid-
" eration is expressed or implied. All the decisions
" upholding part payment as a discharge of the whole debt
" have turned upon one or the other of these apparent
" exceptions. The consideration may be slight, but it
" must be found to exist; as the payment of a note before
" maturity, or by the promise of another party, or in chat-
" tels not required by the contract, or in any other manner
" differing from the original agreement, which may seem
" to be more beneficial to the payee. (Child *et al. v.*
" United States, 12 Wall. 232, and 7 C. Cls. R. 209; Mann
" *v.* United States, 17 Wall. 67, and 8 C. Cls. R. 125;
" Comstock's case, 9 C. Cls. R. 141.)

" In the present case there was no new consideration for
" the discharge of the whole of the claimant's demand, no
" voluntary compromise, and no accord and satisfaction
" from which a consideration can be implied. The de-
" fendants' officers, having the power, arbitrarily reduced
" the liquidated debt due the claimant by deducting from
" it a sum in set-off, which we have shown was not a legal
" and valid claim. At that time the money paid to the
" claimant had been long overdue, and the defendants did
" nothing more than to satisfy, to that extent, their long-
" matured obligations. It was a simple payment of part
" when the whole was due and ought to have been paid;
" nothing more. The yielding was all on one side, which
" renders the receipt *nudum pactum* as to the unpaid por-
" tion of the claim.

" In Bostwick's case (92 U. S. 53, and 12 C. Cls. R. 67)
" the claimant had leased to the defendants certain real es-
" tate for one year at the rent of $500 a month. Before
" the expiration of the year the defendants notified the
" owner that they should reduce the rent to $250 a month.
" Thereafter rent was paid at the reduced rate, and re-
" ceipts were given by the lessor in full payment. The

" court held that as to the rent for the one year specified " in the lease the receipts were *nudum pactum*, and the " claimant recovered the agreed price for the unexpired " part the term ; but as to the rent for the occupation " after the expiration of the lease, the notice, acceptance, " and receipts constituted a new contract." (Field's Case, 13 C. Cls. R. 41.)

It should be well remembered that execution cannot issue upon a judgment against the United States. Payment is alone made by Congressional appropriation. Having despotic power over its creditor in this regard, the Government's attempt to impose new conditions by offering partial payment or otherwise is *pro tanto* an attempt to change its contract liability, and hence *nudum pactum*, as the cases *supra* well establish. A *judgment* against the United States is property. The concomitant right to interest thereon is likewise property. To *force* its creditor to accept less than what is due by the law of the land and without any new or changed consideration therefor does not extinguish the remainder of the debt, nor does the acceptance of part of what is thus established to be due constitute a waiver by the creditor of his right to the residue. There cannot be one rule for the sovereign and another for the citizen. Partial payment under such circumstances does not relieve the citizen, nor can it relieve the United States. An unliquidated demand—a controtroversy over what is lawfully due—presents a case where acceptance of a compromise sum would be binding ; but where the claim has ripened into judgment, and the right to interest thereon has attached under the law, it cannot be taken away by such forced reprisal.

III.

The statute, sec. 1090, gives the claimant interest. This right cannot be taken away unless by express stat-

ute. A provision in an appropriation bill is not such an expression of the will of Congress as to operate as a repeal of an express statute to the extent of taking away rights previously conferred by statute.

This statute contained no repealing clause, and, we submit, does not deprive the claimant of the right to interest conferred upon it by sec. 1090 R. S.

Respectfully submitted.

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A. T. BRITTON,
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Att'ys for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1894.

THE PACIFIC RAILROAD, APPELLANT,
v.
THE UNITED STATES, APPELLEE.
} No. 233.

BRIEF FOR APPELLEE.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE PACIFIC RAILROAD, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 233.

BRIEF FOR APPELLEE.

STATEMENT OF THE FACTS.

On the 28th of April, 1885, appellant recovered a judgment against appellees in the Court of Claims for the sum of $44,800.74, and on the 29th of April presented a copy of the same, properly certified, to the Secretary of the Treasury. Said judgment was not at that time paid, and was still unpaid when both parties took appeals to this court—the appellees on the 14th of July, 1885, and the appellants on the 15th of July, 1885.

Said case was tried by this court and the judgment of the Court of Claims reversed and a mandate issued to said court, in pursuance of which it, on the 9th of February,

1887, entered judgment anew in favor of appellant for $130,196.74, and, on the 10th of February, 1887, appellant presented to the Secretary of the Treasury a properly certified copy of said judgment.

The finding (III) of the court that this latter judgment was rendered on the 19th day of February, 1887, and was presented to the Secretary of the Treasury on the 9th day of February, 1885, is manifestly a clerical error. The records filed in the case in the Court of Claims, upon which that court based its findings, as also the petition, show the dates I have given above to be the correct dates.

The principal sum of said last-named judgment has been paid under the act of February 1, 1888 (25 Stat. L., 24), but appellees have not paid and have refused to pay any interest upon either of said judgments.

Upon the refusal of the Treasury Department to pay interest upon said judgments appellants sued for said interest in the Court of Claims, and judgment there going against it, appealed to this court.

Claimant demands, first, interest on the judgment of $44,800.74 rendered April 28th, 1885, which was appealed from and reversed; and, secondly, on the judgment of $130,196.74 rendered February 9th, 1887, from which no appeal was ever taken.

In order that the appellant shall be entitled to recover interest upon either of the judgments above referred to, it must bring itself within the exact language of section 1090, which reads as follows:

> SEC. 1090. In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the Supreme Court, interest thereon at

> the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid.

The general rule excluding creditors of the Government from interest must apply to this claimant unless it can qualify under the exact terms of the exception created by this statute.

With reference to the later judgment of $130,196.74, rendered February 9, 1887, no argument can be necessary. This judgment never was brought in any respect within the terms of section 1090, for no appeal from it was ever taken, and, therefore, it never was affirmed by the Supreme Court.

With reference to the former judgment rendered in April, 1885, claimant is almost equally remote from the case required by the statute, namely, that of a judgment in favor of a claimant appealed from and *affirmed* by the Supreme Court. This judgment in favor of the claimant was appealed from by both parties but was never affirmed.

The claimant below rested entirely upon one opinion of the Court of Claims, namely, the case of Hobbs (19 C. Cls. R., 279), but the distinction between that case and this is well pointed out by the Chief Justice in his opinion, for there the judgment was in express terms affirmed, and the allowance of interest was made upon the express ground that the Supreme Court, in the exercise of their powers of review, had placed the judgment within the exact terms of section 1090. The same reasoning that allowed interest in the Hobbs case must exclude it here.

I need hardly add anything to the very able and conclusive opinion upon this very claim given by Attorney-General Garland (18 Op. Atty. Gen., 547), wherein he says:

> It is not permissible to take such liberties with the language of the statute as to interpret the word "affirmed" as meaning "reversed." Neither can you assume to construe the word "reversed" in the certificate into the word "affirmed" used in the statute. As stated by Attorney-General Black (9 Opinions, 59): "But if Congress has all the money of the United States under its control it has the whole English language to give it away with, and it is so easy to use definite terms in a law like this that when they are not used we will presume them not meant." If Congress had intended the words "affirmed" in the statute and "reversed" in the certified copy of the judgment to be construed by you as synonymous, it would have said so.

The appellant in the court below relied upon Hobbs's Case (19 C. Cls. R., 220); but, as pointed out by Chief Justice Richardson in the opinion in this case, the Supreme Court in its mandate described the judgment in that case as having been affirmed, and ordered that an additional amount be allowed. The records of the Supreme Court are the only means of ascertaining what disposition has been made of a case upon its docket, and when those records describe a case as having been affirmed it is conclusive, and that case falls within the limits of section 1090, Revised Statutes. On the contrary, when the records assert that a case has been reversed, that case is just as conclusively put beyond the control of the statute.

The claim in this case for interest upon the judgment of $44,800.74, entered April 28, 1885, is further improper in that the statute (sec. 1090) is clearly intended only to compensate claimants whose rights have been correctly adjudicated by the Court of Claims, pending an appeal by the Government, when such claimants are satisfied with the judgment of the Court of Claims, and are seeking to enforce the same without objection.

In this case, while the claimant perhaps brought itself within the exact terms of the statute with reference to demanding payment of this judgment by the presentation thereof to the Secretary of the Treasury for payment, which he did on the 29th of April, 1885, yet before such payment could be made, to wit, on the 15th day of July, 1885, he repudiated that demand, so far as it served to signify claimant's readiness to stand upon the judgment, by taking an appeal from the judgment to the Supreme Court. From that time forward the delay in payment of the amount so adjudged could not be ascribed to the Government alone. After that appeal was taken the judgment could not be paid had the Government been willing. A dismissal of the Government's appeal would have left the matter still pending in the Supreme Court upon claimant's appeal, and no tender could have been effective to satisfy the judgment.

If the purpose of section 1090 is compensation by way of interest to claimants for delays in their adjudicated rights caused by the Government, claimant was outside of that purpose, for the delay up to the decision of the appeal was as much caused by it as by the Government. If, on the other hand, the underlying principle of that section of

the statutes is an allowance of interest by way of damages for the wrongful detention of claimant's money, that detention ceased to be wrongful on the part of the Government as soon as it was rendered necessary by the fact of claimant's own appeal.

II.

Even if it were conceded that under the law as it existed at the time of the rendition of this judgment claimant would have been entitled to the interest demanded, there exists a complete legislative obstacle to its recovery. By the act of Congress under which payment of said judgment has been accepted by the claimant, to wit, the act of February 1st, 1888 (25 Stat. L., p. 24), it was provided that the sum making up the $130,196.74, which was appropriated by said act, should be in full satisfaction of the judgment rendered by the Court of Claims.

With this condition and subject to this burden, even though it had been a new one, claimants were satisfied to accept, receive, and receipt for their money, and upon all doctrines of election or settlement they have conclusively estopped themselves from claiming anything more upon any ground whatever. It was perfectly within the power of Congress to modify existing law or to impair the obligation of any contract with the claimants then existing, and if it were necessary to invoke that power the language used in the appropriation act was a complete exercise of it.

J. E. DODGE,
Assistant Attorney-General.
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Assistant Attorney.